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No. 504

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1958

CHARLES ALLEN TAYLOR,

Petitioner,

v.

NEIL McELROY, A. TYLER PORT,

Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

To the Honorable the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Petitioner prays that a writ of certiorari issue to the Court of Appeals to review the judgment in this case of the United States District Court for the District of Columbia.

Opinion Below

The opinion and judgment of the District Court are not reported but are printed in Appendix A, *infra*, p. 16. Since the District Court held, and both parties agree, that

the decision of the Court of Appeals in *Greene* v. *McElroy*, certiorari granted October 27, 1958,[1] precludes the relief sought by petitioner, the *Greene* opinion is reprinted as Appendix B, *infra*, p. 18.

Jurisdiction

Summary judgment was entered against petitioner by the United States District Court for the District of Columbia on October 14, 1958. Petitioner docketed his appeal in the Court of Appeals for the District of Columbia Circuit by filing the original record in the Court of Appeals on October 16, 1958. Petitioner is invoking the jurisdiction of this Court under 28 U.S.C. 1254(1) to grant certiorari before judgment in the Court of Appeals because the "confrontation" issue pending before this Court in the *Greene* case is so amplified and illuminated by the record herein as to render concurrent consideration of petitioner's and Greene's case a matter of "imperative public importance." Rule 20; *cf. Bolling* v. *Sharpe*, 347 U.S. 497, 498.[2]

Questions Presented

1. Whether federal courts are powerless to afford redress against the Government's arbitrary revocation of petitioner's clearance for access to classified defense information based solely on accusations by faceless informants confronted neither by petitioner nor the Hearing Board and

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[1] *Greene v. McElroy*, 254 F. 2d 944; No. 180, October Term, 1958.

[2] In Point II of the Reasons for Granting Certiorari, *infra*, pp. 12 to 15, we indicate the ways in which the record herein amplifies and illuminates the vital "confrontation" issue now pending before this Court. In addition, however, the Court should note that this is a case of review "before judgment" only in a technical sense; since both parties agree with the District Court that the "no justiciable controversy" ruling in *Greene* precludes the relief petitioner seeks, the only judgment that the Court of Appeals could enter would be a pro forma affirmance on the authority of *Greene*, which would in no way assist this Court in resolving the pending issues.

contrary to petitioner's unrebutted demonstration to the Hearing Board of the utter falsity and patent implausibility of the accusations against him, where such arbitrary revocation results in the termination of his employment and the curtailment of his means of livelihood.

2. Whether, if power to afford redress exists in the federal courts, it is consistent with statutory authority and the due process clause of the Fifth Amendment for the Government to revoke petitioner's clearance for access to classified information solely on the basis of accusations by faceless informants confronted neither by petitioner nor the Hearing Board and contrary to petitioner's unrebutted demonstration to the Hearing Board of the utter falsity and patent implausibility of the accusations against him.

Statutes Involved

The statutes and regulations of the Defense Department upon which the Government apparently relies for its authority are set forth in Appendix C, *infra*, p. 34.

Statement

Petitioner was employed from 1941 until 1956 as a tool maker at Bell Aircraft Corporation, Buffalo, New York (S. 4).[3] On September 6, 1956, without advance notice or intimation of any sort to petitioner, the Office of Industrial Personnel Security Review of the Defense Department dispatched a letter to the company suspending any and all clearances for access to classified defense information then held by petitioner (S. Ex. 6). Because of this suspension of clearance and since petitioner's work as a tool maker required access to classified defense information, petitioner

[3] Where the letter "S" is used, it refers to the Stipulation of Facts entered into between the parties. Where the letter "T" is used, it refers to the transcript of the 1956 "hearings" before the New York Industrial Personnel Security Hearing Board. The entire original record is before this Court.

was forthwith discharged by the company on September 11, 1956, and since that date has been unable to obtain employment sufficient for means of livelihood (S. 4-5; S. Exs. 3, 5, 8).

Shortly after his discharge, petitioner received from the Office of Industrial Personnel Security Review of the Defense Department a "Statement of Reasons", dated September 10, 1956, for the suspension of his clearance for access to classified defense information (S. Ex. 7). This 1956 Statement of Reasons charged that in 1942 and 1943 petitioner had been a member of, paid dues to, and held a membership card in, the Communist Party. Petitioner promptly entered a categorical sworn denial of the charges and submitted a "Notice to Produce" asking to be informed of the names and addresses of the persons upon whose information the charges in the Statement of Reasons were based (S. Exs. 9, 12).

On November 1, 1956, petitioner appeared at the "hearing" before the New York Industrial Personnel Security Hearing Board to defend himself against the charge of Communist affiliation some 13 or 14 years earlier. At the outset of the "hearing", the Board made clear that it would produce no evidence in support of its charge of Communist affiliation nor even inform petitioner of the names of his accusers (S. 6; T. 4, 8-10). Thereupon, notwithstanding the difficulty of proving a negative and particularly a negative concerning years long past, petitioner undertook and accomplished the task of showing the utter implausibility and falsity of the charge.

Petitioner testified under oath that he had never been a member of, paid dues to, held a card in, or aided or abetted, the Communist Party in any manner (T. 374-468). He not only gave categorical sworn denials to the charge of Communism and each facet thereof, but he demonstrated his continuous public opposition to the Communist Party pro-

gram and the Communist Party leadership of his local union (*ibid.*). Lengthy cross-examination by the Board and its counsel served only to reinforce petitioner's testimony (T. 400-457, 463-468).[4]

Eleven witnesses took the stand to demonstrate under oath that the charges were patently implausible and wholly false. Petitioner's son, Eugene Taylor, and ten employees of the Bell Aircraft Corporation, most of whom presently hold security clearances at Bell and all of whom have worked with and known petitioner during the fifteen years of his employment there, testified that petitioner had never discussed Communism or the Communist Party favorably; had no Communist books, literature or friends; and was regarded by the witnesses and others active in the local UAW union as "an independent thinker, and . . . not a Communist. Now or ever" (T. 15-373, 84). In the words of one witness, Thomas Smith, "if Russia or any foreign country invaded this country, Taylor would be the first guy to get shot fighting them. That's the kind of guy he is, to me . . . He's a real, 100 per cent American" (T. 326).

These eleven witnesses not only proved petitioner's *non-Communism;* they also proved his *anti-Communism* during the very period that faceless informants allege his Party membership. The Communist Party leader of petitioner's local UAW union in 1942-1943 was Allie Brodose. John Maturski, who defeated Brodose for the presidency of the local in 1943 on an all-out anti-Communist platform, testified that petitioner stood with him publicly in opposition to Brodose and the Communist Party program urged by Brodose (T. 113-169). Joseph Rosmyslowski testified that petitioner had frequently been publicly opposed to, and had

[4] For example, the Board's repeated efforts to tie petitioner to the Communist Party by questioning him about a list of persons apparently known to the Board as Buffalo-area Communists only indicated anew petitioner's absence of Communist affiliation for he was totally unacquainted with these people (T. 406-10, 412-13, 421, 442-44, 466).

become generally known as a bitter enemy of, Brodose—indeed he recalled an angry public argument between petitioner and Brodose in 1942 or 1943 in which petitioner repeatedly referred to Brodose as a "red" (T. 53-81, 78). Leon Meyers recalled an incident in 1942 or early in 1943 when petitioner had warned him about associating with Brodose because "you know he's a Commie" (T. 268-269). Petitioner's 1942-43 consistent public opposition to Brodose personally and to the Communist Party platform urged by Brodose, was testified to, on personal observation, by all ten of the Bell Aircraft employees who appeared in his behalf (T. 53-56; 67-81; 124-128; 147; 159-160; 178-179; 200; 220-225; 232-234; 258; 266-269; 274; 288-289; 293-294; 306-308; 320-325; 346-348; 351-352; 366-368; 370-372).

After three days of "hearing" before the Industrial Personnel Security Hearing Board, there was not a word in the record of the hearing to support the charge against petitioner, but, on the contrary, only the testimony of twelve witnesses on direct and cross-examination showing the patent falsity and implausibility of the charge against petitioner. Yet, notwithstanding this sworn record, the Office of Industrial Personnel Security Review on June 14, 1957 found "true as stated" the charge that the petitioner had been a member of, paid dues to, and held a membership card in, the Communist Party during 1942-43 (S. Ex. 14). On the basis of this incredible finding, petitioner's security clearance was permanently denied as "not clearly consistent with the interests of national security" (*ibid.*).

On November 22, 1957, petitioner appealed to the Secretary of Defense asking either to be given clearance or to be confronted with his accusers (S. Ex. 15). Five months having elapsed without action by the Defense Department on his appeal to the Secretary, petitioner filed this suit in

the United States District Court for the District of Columbia seeking a review of the denial of his clearance without confrontation by his accusers. On May 30, 1958, more than six months after petitioner's appeal to the Secretary of Defense and more than six weeks after the institution of this action, the General Counsel of the Defense Department advised petitioner that the adverse security determination in his case, although "reasonably supported", had been set aside and that the case was being returned to the Hearing Board for unspecified "further proceedings" (S. Ex. 18).

On June 19, 1958, the Hearing Board transmitted an Amended Statement of Reasons to petitioner (S. Ex. 23). The charge contained in this Amended Statement was practically identical with the former charge. The only real difference was that the new charge, instead of alleging that petitioner had and "*may still have* membership in the Communist Party", now alleged that he had been *expelled* from the Communist Party in 1943. In addition, the Amended Statement, in a civil administrative "indictment" for perjury, charged petitioner with false testimony at his 1956 hearing in denying Communist Party affiliation (*id.* at pp. 4-5). Petitioner immediately denied the amended charge under oath, and pointed out through his counsel that "Mr. Taylor is the first American to be judged by a tribunal which accuses the defendant upon secret accusations of being untruthful in his assertions of innocence" (S. Ex. 24).

Now at long last, after two years of waiting, it appeared that petitioner might be confronted by his accusers. A hearing was scheduled for July 11, 1958, and petitioner appeared with counsel ready to face his accusers only to be told by the Board that no decision had yet been reached on whether to confront him with his accusers. The hearing was continued (S. 8).

On August 1 the hearing was reconvened once again.

This time the Board flatly announced that it was not going to confront petitioner with his accusers.[5] Instead the Chairman read into the record anonymous synopses of accusations of Communist affiliation in 1942-43 (S. Ex. 30). The Board refused to indicate whether it had ever examined the confidential informants, what if anything it knew about their past criminal or other records, and what degree of hearsay was involved in the assertions of the informants (S. Ex. 31, 33).[6]

Petitioner having been denied confrontation again and

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[5] August 1, 1958, Hearing Transcript, at pp. 50-59.

[6] The Board's embarrassment at answering these questions is understandable, for the record is clear that the Board had no direct evidence available to it and was required to consider second-, third- and fourth-degree hearsay assertions of accusers the Board itself never saw. Reliance by the Board upon remote hearsay charges by informants the Board itself never sees has been fully conceded by Mr. Jerome Fenton, Director of Industrial Personnel Security, before the Senate Subcommittee on Constitutional Rights (84th Cong., 2d Sess., Hearings, pp. 623-4); and the anonymous synopses of the accusations which the Board read into the record here reveal this fact. For instance, one of the confidential sources is said to have furnished information "in substance showing that in or about July 1944 he had seen a list of names in the possession of a member of the Buffalo Branch, Socialist Workers Party, of persons favorable to the Socialist Workers Party . . . and that this list contained the name Charles Taylor." (S. Ex. 30, p. 63). Thus the Board was permitted to draw inferences concerning the charge of petitioner's Communist Party membership from 1) an unknown person's preparation of a list of persons "favorable to the Socialist Workers Party" which was 2) seen by an unnamed informant in the possession of 3) yet another unknown person, all of which was told presumably 4) to a governmental agent and 5) ultimately transmitted to the Hearing Board.

With reference to the Board's access only to investigative reports (see S. 6) rather than to original materials, the record contains a specific concession by the Chairman concerning the alleged Communist Party membership cards or books of petitioner that "this Board does not physically at this time have those cards in its possession . . . we have no information as to whether or not the signature of Mr. Taylor appears on the card or book alleged to be a membership card, or membership book of Mr. Taylor . . ." (T. 10-11). No answer has ever been made by the Board to the point made by counsel for petitioner that a card in the name of "Charles Taylor" could not possibly be the card of any man by the name of Charles Taylor, since pseudonyms were invariably used by the Communist Party.

again, it was now apparent that his appeal to the Secretary of Defense had produced nothing but a fruitless nine-month delay of legal redress. On September 12, 1958, petitioner filed a Motion for Summary Judgment in the District Court to which respondents cross-moved. A few minutes before the argument in the District Court on October 14, 1958 on these motions, counsel was informed that petitioner had once again been finally denied security clearance. Thereupon, the District Court, although stating that it had been "concerned about the administrative proceedings, because of the periods of delay," entered summary judgment against petitioner "under the controlling ruling" of the Court of Appeals in the *Greene* case. See Appendix A, *infra*, p. 16.

On October 16, 1958, petitioner docketed his appeal by filing the original record in the Court of Appeals. On October 27, 1958, this Court granted certiorari in the *Greene* case. No. 180, October Term, 1958. This petition is being filed promptly and before judgment in the Court of Appeals (*cf. Brown* v. *Board of Education*, 344 U.S. 1, 3; *Bolling* v. *Sharpe*, 347 U.S. 497, 498) in the belief that a pro forma affirmance of petitioner's case by the Court of Appeals on the authority of *Greene* would not assist this Court in disposing of the grave constitutional issue involved, and with confidence that the record herein will materially amplify and illuminate that issue.

REASONS FOR GRANTING THE WRIT

I

The Government's Practice of Branding a Worker a Security Risk, Thus Depriving Him of Employment and Means of Livelihood, Without Affording Him an Opportunity to Confront His Accusers, Calls for Review by This Court

1. Constitutional questions of grave importance are presented by Governmental action branding a worker a "security risk," thus depriving him of his employment and means of livelihood, on the basis of a "hearing" wherein fair opportunity to defend is denied the accused. Where the charges are based on accusations supplied by faceless informants unavailable for examination either by the accused individual or the Hearing Board, there is no such fair opportunity and the purported hearing is arbitrary governmental action and a travesty on democratic processes. The power of the federal courts to review and redress such arbitrary governmental action presents an important question of federal law which has not been, but should be, settled by this Court.

Indeed, this Court has twice granted certiorari for the purpose of resolving the confrontation issue in the case of Government employees. *Bailey* v. *Richardson*, 341 U.S. 918; *Peters* v. *Hobby*, 349 U.S. 331. The issue is no less significant in the case of industrial plant workers whose very livelihood is at stake in a Defense Department security program applicable to more than three million employees. The issue here presented regularly arises under Defense Department Regulations denying confrontation[7] and will continue to arise until its final resolution by this Court.

2. There is a clear conflict between the decision of the Court of Appeals for the Ninth Circuit in *Parker* v. *Lester*, 227 F. 2d 708, and the decision in petitioner's case and in *Greene*. In the *Parker* case, contrary to the holding below, the Ninth Circuit Court of Appeals not only found that a denial of security clearance on charges by unconfronted

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[7] The Defense Department's Industrial Security Review Regulation (see Appendix C, p. 34, *infra*) provides in relevant part that no "information which might compromise investigative sources or methods or the identity of confidential informants, will be disclosed to any contractor or contractor employee, or to his lawyer or representatives . . ."

informants violates the constitutional rights of seamen, but upheld the jurisdiction of the federal courts to afford relief against such violation.[8]

3. The holding in petitioner's case and in *Greene* likewise conflicts with decisions of this Court. Whether petitioner's access to classified defense information, upon which depends his job and means of livelihood, is denominated a "right" or a "privilege", he may not be branded a risk and denied clearance pursuant to a Governmental procedure which is patently arbitrary and unfair. *Joint Anti-Fascist Refugee Committee* v. *McGrath*, 341 U.S. 123; *Wieman* v. *Updegraff*, 344 U.S. 183; *Schware* v. *Board of Bar Examiners*, 353 U.S. 232; *Speiser* v. *Randall*, 357 U.S. 513, 518-19.

Moreover, the ruling in *Greene* and in petitioner's case that no "justiciable controversy" is presented by a prayer for relief from arbitrary security procedures plainly conflicts with this Court's ruling in *Harmon* v. *Brucker*, 355 U.S. 579. If "judicial relief is available to one who has been injured by an act of a governmental official which is in excess of his express or implied powers," as this Court held in *Harmon* in the case of a stigmatic military discharge, certainly such relief is equally available to one deprived of his livelihood by a stigmatic security finding unauthorized by statute and contrary to constitutional guarantees.

Each of these three grounds for certiorari appears adequate. Elaboration would hardly seem necessary since this Court only recently deemed substantially the same grounds adequate for granting certiorari in *Greene* to

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[8] The Government suggests that *Parker* is somehow different from the cases of petitioner and of Greene because Coast Guard clearance was required as a condition precedent to employment as a seaman on private ships. But Defense Department clearance is no less required as a condition precedent to employment as a tool maker in private industrial plants handling classified information.

review the confrontation issue. The only remaining question is whether concurrent consideration of petitioner's case will assist this Court in resolving that vital issue now pending before the Court.[9] We turn now to that question.

II

The Record in Petitioner's Case Provides Material Illumination and Amplification of the Confrontation Issue Now Pending Before This Court

This Court might well desire, in deciding an issue of first instance vitally affecting the lives and livelihood of millions of American workers, to have before it more than one set of facts illustrating the operation of the non-confrontation policy. And this might well be true even though both illustrations of the operation of the non-confrontation policy were factually quite similar. Here, however, we respectfully suggest that the record in petitioner's case will not only add a broader factual basis for this Court's determination, but will also present the confrontation issue to the Court even more sharply defined and more fully documented than does the record in *Greene*.

(i) The question in petitioner's case is clearly one of fact —whether petitioner was a member of the Communist Party in 1942-1943—and confrontation is essential to a meaningful resolution of this question of fact. The question in *Greene*, on the other hand, is not essentially the truth or falsity of the factual allegations against Greene, but rather the "significance of the matters set forth in the statement of reasons" on the issue of his security reliability (Pet., p. 10). The Government even suggests, in its opposition to Greene's petition (p. 16), that "the essential facts . . .

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[9] Under the Court's schedule of arguments, the granting of certiorari will permit concurrent consideration of this case with *Greene* without delaying argument or decision in the latter.

were admitted at the hearing", affording "a rational basis for denying him access to classified information. . . ." Without in any way accepting the Government's suggestion, it is noteworthy that no such contention can possibly be raised by the Government in petitioner's case.

(ii) Confrontation is far more indispensable to determining the truth or falsity of factual charges than to evaluating the "security-reliability" significance of admitted facts. Thus, petitioner presents the Court with a case in which confrontation is a *sine qua non* of a fair result. The Hearing Board accepted the charges supplied by unknown and unexamined accusers even though petitioner and eleven other witnesses, under cross-examination and penalty of perjury, swore to facts which made the charges totally implausible. If petitioner and his eleven sterling witnesses could not prevail against patently implausible accusations of unknown accusers, we find it difficult to conceive of a fair result in any case involving a major factual conflict.[10]

(iii) Indeed, the Board's preferring of the accusations by unknown informers over the open record made by petitioner and his eleven witnesses, is rendered inevitable not only by the absence of cross-examination, but equally, if not more so, by the Board's inability to evaluate the charges of accusers the Board itself never saw. There can be no doubt on the record at bar that petitioner's faceless accusers were not only unknown and unseen by petitioner, but also unknown and unseen by the Board members themselves.[11]

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[10] The defenders of a security program predicated on unconfronted accusers have always made much of the fact that an accused is accorded an opportunity at a "hearing" to present his side of the case and witnesses on his behalf. Undoubtedly this opportunity to rebut accusations by faceless informers by presenting affirmative evidence is of value when the issue is one of interpreting and explaining away admitted facts. We suggest, however, that this opportunity to present evidence is meaningless where, as here, the issue is one of controverting facts asserted by unknown accusers.

[11] See *supra*, n. 6, p. 8.

Certainly, in determining whether non-confrontation renders security hearings arbitrary and unlawful, this Court will want to consider the circumstance at bar that the deciding agency itself, as well as the accused, was denied benefit of confrontation.

(iv) Moreover, the Board's inability to evaluate the charges of informants whom the Board itself never saw was compounded by the fact that the Board was considering varying degrees of hearsay allegations against petitioner. Even a cursory examination of the anonymous synopses of information supplied by petitioner's accusers (S. Ex. 30) demonstrates that the Board was considering their second-, third- and even fourth-degree hearsay allegations.[12]

(v) The blind acceptance of the information supplied by the informants is all the more arbitrary since petitioner's accusers could not possibly have been Government undercover agents. Whatever claim to a national security interest might conceivably be made for the protection of the anonymity of Governmental agents presently in the councils of the Communist Party, the record here is clear that the information against petitioner was not supplied by any contemporaneous agent within the Party.[13] In weighing the Government's nebulous "security" claims, this Court may well want to consider the type of informants shielded from disclosure by the policy against confrontation.

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[12] *Ibid.*

[13] Had the information concerning petitioner come from government agents infiltrating the Communist Party while petitioner was allegedly a member, we cannot conceive of the Government's delaying security proceedings against him from 1942 or 1943 until 1956. Indeed, the synopses of accusations against petitioner make quite clear that the adverse information was derived from the "recollection" of private informants about events long past (S. Ex. 30). Clearly, not undercover Government agents but mere casual informants are involved; one cannot believe that such agents would first have reported the possibility of petitioner's continuing membership in the Party and then later have asserted his expulsion therefrom in 1943 (*supra*, p. 7).

In the final analysis, this Court will have to weigh the conflicting interests described by the Solicitor General in presenting the Government's position to this Court in the related *Bailey* case: "The harm to the individual must be weighed against the harm to the public. The problem is one of 'balancing the conflicting individual and national interests involved' . . ." The significant contribution of petitioner's case towards the balancing of these interests is in the clarity of its demonstration on the one hand of the inevitable unfairness in procedure and result when confrontation is denied and, on the other hand, of the absence of any genuine national interest justifying the denial of confrontation.

Conclusion

For the foregoing reasons, it is respectfully requested that the petition for a writ of certiorari be granted.

Respectfully submitted,

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APPENDIX A

Opinion and Judgment of the United States District Court for the District of Columbia

THE COURT: The Court has studied the pleadings, the exhibits in this case at great length. I have been concerned about the administrative proceedings, because of the periods of delay, and the apparent uncertainty on the part of the Defendants in reaching some final conclusion in the case.

As counsel knows, however, the Court has no authority to substitute its judgment for that of the Executive officers charged with the discharge of these duties. I believe the Court's ruling in this case, as counsel for the Plaintiff concedes, is entirely bound by the holding of the Court of Appeals in the case of Greene v. McElroy. I have been unable to distinguish this case from the ruling in the Greene case.

Accordingly, the Court is required to grant the Defendants' motion for summary judgment and to deny Plaintiff's motion.

• • • • •

ORDER

This cause having been heard on plaintiff's and defendants' motions for summary judgment and defendants' motion to dismiss, and the Court having considered the entire record, the pleadings, affidavits, stipulation of facts with attached exhibits, and memoranda of points and authorities filed herein, and there having been a full and complete hearing and the Court having found that there is no genuine issue as to any material fact and that the defendants are entitled to judgment as a matter of law under the controlling ruling of the United States Court of Appeals for the District of Columbia Circuit in *Greene* v. *McElroy*, 254 F. 2d 944, it is therefore, by the Court this 14th day of October, 1958:

ORDERED that the plaintiff's motion for summary judgment be, and the same hereby is, denied; and it is

FURTHER ORDERED that the defendants' motion for Summary Judgment be, and the same hereby is, granted, and that the complaint be, and the same hereby is, dismissed with costs to the defendants.

(S.) EDWARD A. TAMM,
United States District Judge.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No 13,978

WILLIAM L. GREENE, APPELLANT,

v.

NEIL M. MCELROY, Secretary of Defense, et al., APPELLEES.

Appeal from the United States District Court for the District of Columbia

Decided April 17, 1958

Mr. Carl W. Berueffy for appellant.

Mr. Donald B. MacGuineas, Attorney, Department of Justice, with whom *Assistant Attorney General Doub* and *Messrs. Oliver Gasch*, United States Attorney, *Paul A. Sweeney* and *Miss Beatrice M. Rosenhain*, Attorneys, Department of Justice, were on the brief, for appellees.

Before WILBUR K. MILLER, WASHINGTON and DANAHER, Circuit Judges.

WASHINGTON, *Circuit Judge*: This case challenges the revocation of a "security clearance" by the Secretary of the Navy. The Secretary's act withdrew from appellant Greene, an employee of a private corporation holding Defense Department contracts, access to classified defense information. The instant appeal seeks reversal of an order of the District Court, 150 F.SUPP. 958 (D.D.C. 1957), dismissing appellant's complaint for lack of a justiciable controversy between appellant Greene on the one hand, and the Secretary of Defense and his subordinate the Secretary of the Navy on the other.

I

The facts of the case are these: Upon graduation from the Guggenheim School of Aeronautics at New York University in 1937, appellant Greene was hired as a junior engineer by Engineering & Research Corporation (ERCO), a manufacturing company. From that time until he was dismissed by the corporation in April 1953, he worked for ERCO continuously (save for a short period in 1940 not here relevant). At the time of his dismissal he was ERCO's Vice President in charge of Engineering and General Manager at an annual salary of $18,000 plus bonuses. He then possessed Government clearance for access to "secret" information.[1] His dismissal followed receipt by ERCO's President of the following letter dated April 17, 1953, from appellee Secretary of the Navy:

> "I have reviewed the case history file on William Lewis Greene and have concluded that his continued access to Navy classified security information is inconsistent with the best interests of National security.
>
> "In accordance with paragraph 4.e. of the Industrial Security Manual for Safeguarding Classified Security Information,[2] therefore, you are requested to exclude

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[1] Greene was cleared for access to "confidential" information by the Army on August 9, 1949; for "top secret" by the Assistant Chief of Staff, G-2, Military District of Washington on November 9, 1949; for "top secret" by the Air Materiel Command on February 3, 1950; and for "secret" by the Industrial Employment Review Board on January 29, 1952.

[2] The Industrial Security Manual for Safeguarding Classified Matter was issued by the Department of Defense in January 1951 and subsequently revised. For current edition see 2 Gov't Sec. & Loy. Rep. 25:95 (Feb. 1957). The Manual is incorporated by reference in the Department of Defense Security Agreement (DD Form 441) which must be executed by all defense contractors who wish to secure facility security clearance. Paragraph 4(e) of the Manual (now par. 5(c)) provided:

> "e. The Contractor shall exclude (this does not imply the dismissal or separation of any employee) from any part of its plants, factories, or sites at which work for any military department is being performed, any person or persons whom the Secretary of the military department concerned or his duly authorized representative, in the interest of security, may designate in writing."

William Lewis Greene from any part of your plants, factories or sites at which classified Navy projects are being carried out and to bar him access to all Navy classified security information.

"In addition, I am referring this case to the Secretary of Defense recommending that the Industrial Employment Review Board's decision of 29 January 1952 be overruled."

One week later the President of ERCO, acting pursuant to the security agreement which ERCO had executed,[3] replied to the Secretary, in part:

> "In accordance with your request, please be advised that since receipt of your letter this company has excluded Mr. Greene from any part of our plants, factories or sites and barred him access to all classified security information."

Appellant subsequently requested, and was accorded, extensive administrative hearings, the details of which need not be recounted here. At these hearings appellant was given a thirteen count specification of the reasons for the revocation of his clearance. The Government put on no witnesses, nor did it disclose the investigative reports on which the specifications were based. Appellant took the stand, and presented a number of witnesses. He was finally advised, as of May 28, 1954, that "the granting of clearance to you for access to classified information is not clearly consistent with the interests of national security."

In August 1954 appellant filed this action in the District Court seeking a judgment (1) declaring "illegal, null, void and of no effect . . . the acts of the defendant [Secretary of the Navy] Anderson and all acts of the defendants in

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[3] It was stipulated between the parties that "Under date of June 5, 1951, the United States, acting through the Navy Department, entered into a security agreement with Engineering and Research Corporation. . . . During April, 1953, the Navy Department and Engineering and Research Corporation were parties to classified procurement contracts. . . . All of such classified procurement contracts incorporated by reference the aforesaid Industrial Security Manual, including Paragraph 4c thereof."

pursuance thereof, in advising plaintiff's employer that plaintiff could not be employed," and (2) ordering the appellees "to advise the plaintiff's employer, Engineering and Research Corporation, that the letter of April 25 [17?] signed by . . . Anderson . . . is illegal, null, void, and of no effect."

In February 1955—before Greene's lawsuit had come to issue—the Department of Defense issued its Industrial Personnel Security Review Regulation, Department of Defense Directive 5220.6, 20 FED.REG. 1553 (1955), superseding the joint directive under which Greene's clearance had been revoked. The new directive, *inter alia*, established revised procedures for screening industrial personnel, and the Board set up thereunder was given authority to review prior decisions of regional boards "on the grounds of newly discovered evidence or for other good cause shown."[4] The standard under the new regulation remained that "clearance shall be denied or revoked if it is determined, on the basis of all the available information, that access to classified information by the person concerned is not clearly consistent with the interests of the national security."[5] At Greene's request the new Board undertook to reexamine his case. After submission of further briefs, the Director, Office of Industrial Personnel Security Review, notified appellant's attorney on March 12, 1956, that the Review Board had affirmed the May 1954 decision.

After this adverse decision the case in the District Court proceeded to trial. A stipulation of facts was entered. Both parties moved for summary judgment; the Government also moved to dismiss. It was admitted that appellant had exhausted his administrative remedies. The District Court denied appellant's motion and granted appellees' motions in a memorandum opinion. The Court held, relying on paragraph 4.e. of the Industrial Security Manual, see note 2, *supra*, that there was no justiciable controversy:

> "It is fundamental when one presumes to accept a contractual offer then that offer must be accepted in terms,

[4] DOD Directive 5220.6, par. 24.a, 32 C.F.R. § 67.5-2(a) (Supp. 1957).
[5] DOD Directive 5220.6, par. 12, 32 C.F.R. § 67.3-1 (Supp. 1957).

and one of the terms here, as has been said, related to security controls. The necessity for such is obvious. If the plaintiff's employer did not see fit to accept and conform, it had perfect freedom not to enter into the contract. On acceptance of the offer in terms, it was obliged in the circumstances to carry out its essentials, the presumed result of which was the loss by the plaintiff of his position. But this cannot be said in any degree to be the fault of the Government, for here, through properly constituted authority, it was exercising its right to protect itself against threats to its survival, and as far as the action of an individual was concerned, this action taken, even envisioning the result to the plaintiff, fails to set forth any invasion of his legal rights and, therefore, as has been said, there is no justiciable controversy and the Government's motion for summary judgment is granted.

"Assuming arguendo he was entitled to hearing and review, he was accorded such and an examination of the extensive and repetitive record fails to show any violation of procedural due process. It should be noted also that the hearings held in the instant case apparently are exempted from the requirements of the Administrative Procedure Act, 5 U.S.C.A. § 1001 et seq., as hearings held 'by regulation, rule, custom, or special dispensation; not . . . held by compulsion.' Wong Yang Sung v. McGrath, 1950, 339 U.S. 33, 50, 70 S.Ct. 445, 454, 94 L.Ed. 616." 150 F.Supp. 958, 959-60 (D.D.C. 1957).

This appeal followed.

It should be noted at the outset that Greene does not here contend that the officials of the Department of Defense have failed to comply with the relevant provisions of the various industrial security regulations under which they proceeded against him. To that significant extent at least, this case differs from *Peters* v. *Hobby*, 349 U.S. 331 (1950); *Service* v. *Dulles*, 354 U.S. 363 (1957); and *Cole* v. *Young*, 351 U.S. 536 (1956). In each of those cases the issue treated by the Court was the compliance *vel non* by executive officers with applicable statutes or regulations. And in each of those

cases the Supreme Court found lack of compliance. See also *Stewart* v. *Dulles*, —— U.S.App.D.C. ——, 248 F. 2d 602 (1957); cf. *Vitarelli* v. *Seaton*, —— U.S.App.D.C. ——, —— F. 2d —— (1958). It should further be noted that appellant does not claim that the contracts on which he seeks to work are not validly labelled "classified."

The relief Greene seeks is a declaration that he was barred from access to classified material in a manner which violates the Constitution. He seeks further a court order restoring him to *status quo ante: i.e.*, an order which will make it possible for Erco to rehire him. Thus, in essence, he seeks to compel the Government to disclose its classified defense information to a person—himself—whom the Secretary of Defense considers unworthy of such access.

II

We consider first Greene's contention that the Secretary lacked power to take the action here challenged. He does not argue that the executive lacks all power—inherent or statutory—to classify certain defense information. Nor does he suggest that the subject matter of the Erco contracts was not properly labelled "secret." Rather he argues that the Secretary possesses only limited powers—powers circumscribed by the Fifth Amendment—to decide who shall have access to that classified material.

The Government contends that it possesses statutory authority to restrict access to classified defense information,[6] stemming from Rev.Stat. § 161 (1875), 5 U.S.C. § 22 (1952), which provides:

> "The head of each department is authorized to prescribe regulations, not inconsistent with law, for the government of his department, the conduct of its officers and clerks, the distribution and performance of its business, and the custody, use, and preservation of the records, papers, and property appertaining to it."

[6] It should be noted that at this point we are discussing only the power of the Secretary to withhold classified defense information. We are *not*, at this point, discussing the withholding from Greene of the reports of informants and Federal Bureau of Investigation reports in the proceedings in which Greene challenged the revocation of his clearance.

Additionally, the Government relies on the Armed Services Procurement Act of 1947, 62 STAT. 21, 41 U.S.C. §§ 151-61 (1952), which provides, in part:

> "§ 151.(c) All purchases and contracts for supplies and services shall be made by advertising, as provided in section 152 of this title, except that such purchases and contracts may be negotiated by the agency head without advertising if—
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> "(1) determined to be necessary in the public interest during the period of a national emergency declared by the President or by the Congress;
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> • • • • •
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> "(12) for supplies or services as to which the agency head determines that the character, ingredients, or components thereof are such that the purchase or contract should not be publicly disclosed;
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> • • • • •
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> "§ 153 . . . contracts negotiated pursuant to section 151(c) of this title may be of any type which in the opinion of the agency head will promote the best interests of the Government. . . ."

In this latter statute Congress gave to the Defense Department power—during an emergency[7]—to purchase its supplies by means of negotiated contracts, rather than through public, competitive bids. And it seems to us that Congress specifically gave to the Secretary of Defense broad discretion to determine in what manner the "character, ingredients, or components" covered by the contract should be safeguarded from disclosure. We think that the Procurement Act permits the Secretary of Defense to classify defense information for purposes like the present one. Thus we need not determine whether the "housekeeping" statute, 5 U.S.C. § 22 (1952), is an independent

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[7] A state of national emergency was declared by the President on December 16, 1950. Proclamation No. 2914, 15 FED.REG. 9029. This proclamation was in effect during all of the administrative proceedings in this case.

source of executive authority for withholding defense or other types of executive information.

Furthermore, Executive orders specifically direct department heads to make appropriate provision for safeguarding classified defense information in accord with the congressional authorization of the department head to enter into negotiated contracts.[8] Executive Order No. 10501, and its predecessor Executive Order No. 10290, in their full terms, provide an adequate guide to the Secretary for protecting certain defense information from the risk of improper disclosure during industrial operations, and for enabling him to determine when "the character, ingredients, or components . . . should not be publicly disclosed."

Further, we think that the Secretary has, and of necessity must have, wide latitude in designating persons qualified for access to classified defense information in situations like the present—namely, where the problem relates to the selection of persons to be given that information for the purpose of designing or producing for the Government weapons or other defense materials.[9] Authority of that sort is a necessary adjunct to the power and duty to defend the

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[8] See, for example, Executive Order No. 10290, 16 FED.REG. 9795, 9799 (1951), which provides:

"30.* * * *

"b. *Outside the Executive Branch.* Classified security information shall not be disseminated outside the Executive Branch by any person or agency having access thereto or knowledge thereof except under conditions and through channels authorized by the head of the disseminating agency, even though such person or agency may have been solely or partly responsible for its production."

See also Executive Order No. 10501, 18 FED.REG. 7049 (1953) at Section 7(b).

[9] We are not dealing here with the vexed questions of the right of Congress, or the press, or the public, to be informed of defense operations generally, or to inspect particular documents. On this subject, see Mitchell, *Government Secrecy in Theory and Practice: "Rules and Regulations" as an Autonomous Screen*, 58 COLUM.L.REV. 199 (1958); Wolkinson, *Demands of Congressional Committees for Executive Papers*, 10 FED. BAR J. 103, 223, 319 (1949); Bishop, *The Executive's Right of Privacy: An Unresolved Constitutional Question*, 66 YALE L.J. 477 (1957); 40 OPS. ATT'Y GEN. 45 (1941). See also HAND, THE BILL OF RIGHTS 17-18 (1958).

security of the Nation and, in time of national emergency,[10] to enter into negotiated contracts—contracts of "any type which in the opinion of the agency head will promote the best interests of the Government." One of the primary functions of government is to preserve the national existence. In the exercise of that function, the Government has concluded that secret designs and processes for the production of its own weapons must be protected from disclosure to any persons except those regarded as trustworthy.

Since the Secretary has power to label information "secret" and to designate certain persons for access to that information, *a fortiori* he has power to make regulations to guide himself and his subordinates in such labeling and designation. We are not called upon to decide whether in our view all the regulations he has from time to time promulgated in this field are in every particular or in every possible situation valid and effective. It is enough to say that in our view the general program for industrial security, as reflected in the regulations cited above,[11] does not exceed his authority. We point out in this connection that the regulations are designed to give industrial employees whose trustworthiness is challenged a reasonable measure of information as to the Government's reasons for the challenge, together with an opportunity to make a defense, and to appeal an adverse decision.

III

Appellant claims that the regulations operate to deprive him of his occupation without due process. But the Government has not here attempted to regulate an entire branch of the working population, regardless of the lack of any direct relationship of the tasks of a particular worker to the requirements of the national security, *cf. Parker* v. *Lester*, 227 F.2d 708 (9th Cir. 1955); Brown & Fassett, *Security Tests for Maritime Workers: Due Process under the Port Security Program*, 62 YALE L.J. 1163 (1953). Nor

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[10] See fn. 7, *supra*.

[11] See fns. 2 and 4, *supra*, and DOD Directive 5220.6, 20 FED.REG. 1553 (1955).

has it sought to exclude Greene from serving the general public in those aspects of his profession not connected with secret Government information. *Cf. Schware* v. *Board of Bar Examiners*, 353 U.S. 232 (1957) (involving complete exclusion from law practice, after procedures based on unjustified inferences as to moral character); *Konigsberg* v. *State Bar*, 353 U.S. 252 (1957). This is not a case such as *Truax* v. *Raich*, 239 U.S. 33 (1915), relied on by appellant, where discriminatory governmental action was taken against a class (there, aliens) in such terms as to affect "the conduct of ordinary private enterprise," *id.* at 40, and to deny "the right to work for a living in the common occupations of the community," *id.* at 41. Rather, the Government has here denied Greene access to its military secrets, as contained in its classified documents, under a program having a direct relationship to the requirements of the national defense, and not inherently unreasonable in its coverage or procedures.

Greene points to the fact that he was not confronted with his accusers, and that confidential reports were not revealed to him. But, in our view, confrontation with one's accusers is clearly not required in circumstances like the present. It may be noted that in the case of Federal employees Congress long ago provided in the Lloyd-LaFollette Act that "no examination of witnesses nor any trial or hearing shall be required" when dismissals are made under the provisions of that Act. 37 STAT. 555 (1912), as amended, 5 U.S.C. § 652(a) (1952). A limited form of hearing is provided under the Veterans Preference Act of 1944, for those entitled to its benefits. 58 STAT. 390 (1944), as amended, 5 U.S.C. § 863 (1952). And the Loyalty Order of March 21, 1947, Executive Order No. 9835, 12 FED.REG. 1935, granted hearings to employees who sought them in loyalty matters covered by that order. But mandatory confrontation with accusers is unknown, so far as we know, in dismissals of Federal employees, and has been since the beginning of our Government. See *Bailey* v. *Richardson*, 86 U.S.App.D.C. 248, 182 F.2d 46 (1950), aff'd by an equally-divided Court, 341 U.S. 918 (1951); *cf. Vitarelli* v. *Seaton*, *supra*. Surely appellant is entitled to no more than is available to civil

servants, under existing statutes and existing interpretations of the Constitution.

Much the same must be said of the Government's refusal to disclose to appellant confidential reports of the FBI and other investigative agencies. In certain circumstances, it is true, the courts have penalized the Government for its refusal to disclose information. For example, the courts have said that if the Government brings a criminal prosecution against a person and refuses to disclose certain information necessary for a proper defense, the Government's prosecution must fail. See *Jencks* v. *United States*, 353 U.S. 657 (1957); *cf. United States* v. *Reynolds*, 345 U.S. 1 (1953); *Totten* v. *United States*, 92 U.S. (2 Otto) 105 (1875). But in none of the instances which we have discovered have courts actually ordered the Government to disclose information contrary to its own wishes. In the present case, the only sanction the courts could employ against the Government for failure to disclose all of the information used against Greene would be to declare the revocation of Greene's clearance invalid. If this had any practical effect at all—and courts seldom issue orders which have no practical effect—it would amount to ordering his restoration to access to classified information. This in turn would require the executive to disclose a state secret to Greene or to cancel its contracts with Erco. No court has yet forced the Government to choose between such alternatives—either of which might compromise the security of the country.[12]

To quote from the observations of Judge Wyzanski in

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[12] We have not overlooked the decision of the Supreme Court in Harmon v. Brucker, 355 U.S. 579 (1958). The instant case differs from that in many ways. The main difference for present purposes is that Harmon was not seeking to remain in the Army. Rather he was seeking only to have the Army comply with its own discharge authority under applicable statutes and regulations, and issue him an honorable discharge. Here Greene is essentially seeking to revert to his former status with access to classified defense information. Had Harmon sought an order requiring the Secretary of the Army to retain him in military service, an entirely different case would have been presented.

Von Knorr v. *Miles*, 60 F. Supp. 692 (D. Mass. 1945), a somewhat similar case arising during World War II:

> "Two interests are in competition and must be considered: the government's concern to prevent both sabotage and disclosure to the enemy of secret processes, statistics and information; and the private individual's concern to go where he pleases and engage in such work as is offered him."

After concluding that no constitutional right of the plaintiff Von Knorr had been infringed,[13] Judge Wyzanski went on to say:

> "It is hardly necessary to add that these conclusions of law do not imply that this court believes that it is desirable, as distinguished from legal, for a government, no matter how absolute its power may be, to deny a chance for employment to any citizen merely on the basis of suspicion. Military commanders, like other authorities, will no doubt find it possible as well as just in most cases to give an em-

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[13] The following is pertinent, though we need not go so far in the instant case:

> "Notice, hearing, counsel and the like are admittedly usually appropriate criteria of due process of law. But these guarantees have significance only if in the end the government's right to act turns on an official finding that certain facts exist. Compare Morgan v. United States, 304 U.S. 1, 58 S.Ct. 773, 82 L.Ed. 1129. Where in rare cases such as orders excluding persons from defense plants in war time, the government's right to act is absolute and not dependent upon the facts concerning, or the merits of, any particular case, the formalities of a notice, hearing and counsel are not requisite. Compare United States v. Juy Toy, 198 U.S. 253, 263, 25 S.Ct. 644, 49 L.Ed. 1040. No matter what evidence might be offered by counsel for the government or counsel for the individual, the government would remain legally free to disregard the testimony and rely upon its uncorroborated suspicions. Since in this highly exceptional case, because of its vital interest in war materials and war secrets during war time the government's exclusionary powers are complete, it can refuse admittance to defense plants without giving an explanation, without listening to a protest and without the semblance of a trial." 60 F.Supp. at 971.

ployee notice of the facts which create their suspicion about him and a chance to present his side of the case. Even where power is free of judicial restraint, those who wield it may impose upon themselves self-restraint. And they may accept as canons for their conduct the standards of procedure which in the overwhelming majority of cases are regarded as fundamental to fair play." 60 F. Supp. at 969-71.

Although the First Circuit vacated the District Court judgment on other grounds, sub nom. *Von Knorr* v. *Griswold*, 156 F. 2d 287 (1st Cir. 19[illegible], the Court of Appeals, speaking through Judge Magruder, approved the holding quoted above:

> "If we are correct in the foregoing, the court below should have dismissed the complaint for lack of jurisdiction. We recognize that the matter is not so clear as it might be. Therefore we deem it proper to add that if, contrary to our view, the letter of August 13, 1943, should be deemed in legal effect an order of the Secretary of War, disobedience of which would have subjected Cities Service Oil Company to the penalties of the Act of March 21, 1942, then we would agree with the district court that the order, so regarded, violated no constitutional right of the plaintiff. The full and satisfactory discussion of this phase of the case in the opinion of Judge Wyzanski below (D.C., 60 F. Supp. 962) needs no elaboration by us." 156 F. 2d at 292.

Our views are substantially similar to those expressed by Judge Wyzanski and Judge Magruder. And what has so far been said is an answer, we think, to Greene's contention that he is being "punished" without due process of law. His argument essentially is that because he once was allowed to see confidential documents he has acquired a "status" which cannot be taken from him without full adversary proceedings, attended with most of the safeguards known to the criminal law. We think this ignores the necessities of the Government, and the public interest in maintaining the security of the Nation. As we have indicated, we find no basis for it in the law.

IV

We have no doubt that Greene has in fact been injured. He was forced out of a job that paid him $18,000 per year. He has since been reduced, so far as this record shows, to working as an architectural draftsman at a salary of some $4,460 per year. Further, as an aeronautical engineer of considerable experience he says (without real contradiction) that he is effectively barred from pursuit of many aspects of his profession, given the current dependence of most phases of the aircraft industry on Defense Department contracts not only for production but for research and development work as well. Thus, it seems unrealistic to say —as does the Government in its brief—that:

> "The Secretary's letter presented ERCO with three choices: (1) it could have continued to employ appellant on any work except that requiring access to Navy classified information; (2) it could have continued appellant's employment and declined to perform Navy classified contracts; or (3) it could have concluded it did not, in the circumstances, choose to continue appellant's employment. That ERCO chose to discharge appellant was its own decision, one neither suggested nor required by appellees."

As a practical matter—given Greene's position as Vice President and General Manager and given the applicable Industrial Security regulations—the Government caused Greene to be dismissed from his job at ERCO.[14] The small

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[14] In May 1954, when the revocation of Greene's clearance was affirmed, the applicable facility clearance regulations required that all officers and key personnel of a corporation holding classified defense contracts must have clearance. See 32 C.F.R. § 72.8 (1955). This requirement has been carried forward into subsequent revisions of the program. See 32 C.F.R. § 72.2-107 (Supp. 1956); Security Manual for Safeguarding Classified Information, Par. 16, 2 Gov't Sec. & Loy. Rep. 25:111 (1957).

To some extent the Government acknowledges that withdrawal of clearance may mean the firing of the employee. Provision is made for payment of lost earnings to a contractor employee where, after suspension of clearance, the final determination is favorable to the individual concerned. See Industrial Security Review Regulation, 32 C.F.R. § 67.5-4 (Supp. 1957).

contractor has no effective choice when that choice is either to continue to do business with the Government or to do virtually no business at all. Nor do we doubt that, following the Government's action, some stigma, in greater or less degree, has attached to Greene.

The reality of the injury, however, does not mean that Greene is entitled, without more to judicial relief. There must be a "justiciable" controversy—one which the courts can finally and effectively decide, under tests and standards which they can soundly administer within their special field of competence. Here there is no such controversy. As we have seen, Greene makes no claim of lack of compliance by the Government with its own regulations. He attacks the Secretary's decision on its merits and as a matter of constitutional right. But for a court to hear de novo the evidence as to Greene's fitness to be assigned to a particular kind of confidential work would be a bootless task, involving judgments remote from the experience and competence of the judiciary. Indeed, any meaningful judgment in such matters must rest on considerations of policy, and decisions as to comparative risks, appropriate only to the executive branch of the Government. It must rest also on a mass of information, much of it secret, not appropriate for judicial apprasial. See *Dayton* v. *Dulles*, —— U.S. App. D.C. ——, —— F. 2d ——(1957), cert. granted, 335 U.S. 911 (1958); *United States* v. *Curtiss-Wright Export Corp.*, 299 U.S. 304, 319-22 (1936).

A direct Government employee normally has procedural rights conferred by Congress, which the courts will protect. See cases cited in *Vitarelli* v. *Seaton, supra*, at note 1. But even in the case of a Government employee the courts will not inquire into the merits of a dismissal: they will inquire whether required procedures have been observed, or an applicable statute violated, but they will not—for example—attempt to determine whether an employee is or is not a "security risk," or is "untrustworthy." *Vitarelli* v. *Seaton, supra*, at note 7. No more can the courts examine the merits of Greene's claim that he is trustworthy. In many instances, indeed, such a course would be fruitless: if the official in charge is convinced of a man's unreliability, the

entire situation might be such that he could not in conscience permit the contract with the employer to remain in effect.

The personal tragedy revealed by this recital needs no emphasis. As we have recognized, the reality of the injury suffered by Greene—whether or not deserved—is perfectly clear. So, too, is the risk which the United States must take in denying itself the benefit of the services of a man apparently so proficient in the science of modern warfare. A government which is too cautious in such matters may ultimately have few secrets to protect, or able workers to serve it.

In a mature democracy, choices such as this must be made by the executive branch, and not by the judicial. If too many mistakes are made, the electorate will in due time reflect its dissatisfaction with the results achieved. It would be an unwarranted interference with the responsibility which the executive alone should bear, were the judiciary to undertake to determine for itself whether Greene or any other individual similarly situated is in fact sufficiently trustworthy to be entitled to security clearance for a particular project.

For these reasons, the order of the District Court must be

Affirmed.

APPENDIX C

STATUTES AND REGULATIONS

Industrial Personnel Security Review Regulation, 20 Fed. Reg. 1553, 32 CFR, Part 67 (Supp. 1957), Section 67.1-4:

> *Release of information.* All personnel in the Program will comply with applicable directives pertaining to the safeguarding of classified information and the handling of investigative reports. No classified information, nor any information which might compromise investigative sources or methods or the identity of confidential informants, will be disclosed to any contractor or contractor employee, or to his lawyer or representatives, or to any other person not authorized to have access to such information.

5 U.S.C., § 22, R.S. § 161:

> The head of each department is authorized to prescribe regulations, not inconsistent with law, for the government of his department, the conduct of its officers and clerks, the distribution and performance of its business, and the custody, use, and preservation of the records, papers, and property appertaining to it.

18 U.S.C., § 798:

> (a) Whoever knowingly and willfully communicates, furnishes, transmits, or otherwise makes available to an unauthorized person, or publishes, or uses in any manner prejudicial to the safety or interest of the United States or for the benefit of any foreign government to the detriment of the United States any classified information . . . Shall be fined not more than $10,000 or imprisoned not more than ten years, or both.

Armed Services Procurement Act of 1947, 62 Stat. 21, 41 U.S.C., §§ 151-161 (1952):

> 151(c) All purchases and contracts for supplies and services shall be made by advertising, as provided in

section 152 of this title, except that such purchases and contracts may be negotiated by the agency head without advertising if—

(1) determined to be necessary in the public interest during the period of a national emergency declared by the President or by the Congress; • • •

(12) for supplies or services as to which the agency head determines that the character, ingredients, or components thereof are such that the purchase or contract should not be publicly disclosed; • • •

153 • • • Except as provided in subsection (b) of this section, contracts negotiated pursuant to section 151(c) of this title may be of any type which in the opinion of the agency head will promote the best interests of the Government. • • •

Executive Order 10501, December 15, 1953, 18 Fed. Reg. 7049:

Safeguarding Official Information in the Interests of the Defense of the United States

WHEREAS it is essential that the citizens of the United States be informed concerning the activities of their government; and

WHEREAS the interests of national defense require the preservation of the ability of the United States to protect and defend itself against all hostile or destructive action by covert or overt means, including espionage as well as military action; and

WHEREAS it is essential that certain official information affecting the national defense be protected uniformly against unauthorized disclosure:

NOW THEREFORE, by virtue of the authority vested in me by the Constitution and statutes, and as President of the United States, and deeming such action necessary in the best interests of the national security, it is hereby ordered as follows:

• • • • •

7(b) *Dissemination Outside the Executive Branch.* Classified defense information shall not be disseminated outside the executive branch except under conditions and through channels authorized by the head of the disseminating department or agency, even though the person or agency to which dissemination of such information is proposed to be made may have been solely or partly responsible for its production.

(2730-0)